IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 24, 2008

STATE OF TENNESSEE v. EARL MARION GRINDSTAFF

Appeal from the Circuit Court for Cocke County
No. 30,592 Ben W. Hooper, II, Judge

No. E2007-02377-CCA-R3-PC - Filed August 21, 2008

The Petitioner, Earl Marion Grindstaff, appeals from the order of the Cocke County Circuit Court dismissing his petition for post-conviction relief. He argues that the dismissal was error because he did not receive the effective assistance of counsel prior to pleading guilty to five counts of aggravated sexual battery, and because his sentencing hearing was held more than forty-five days after his guilty plea submission hearing. Following our review of the record and the parties' briefs, we affirm the post-conviction court's order of dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Brad L. Davidson, Newport, Tennessee, for the appellant, Earl Marion Grindstaff.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; James Dunn, District Attorney General; and Amanda H. Inman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

On February 15, 2005, the Petitioner entered guilty pleas to five counts of aggravated sexual battery, Class B felonies, with the length and manner of service of the sentences to be determined by the trial court. See State v. Earl Marion Grindstaff, No. E2005-02059-CCA-R3-CD, 2006 WL 1540257, at *1 (Tenn. Crim. App., Knoxville, June 6, 2006) (adjudicating the Petitioner's direct appeal), perm. to appeal denied (Tenn. Oct. 30, 2006). The fifty-six-year-old Petitioner committed the offenses against his granddaughter's twelve-year-old friend, who would occasionally spend the night at the Petitioner's house. Id. On May 2, 2005, the trial court held a sentencing

hearing at which the victim testified, and the Petitioner's written statement[1] was entered as an exhibit along with the presentence report. Id. at *1–3.

At the close of the sentencing hearing, the trial court sentenced the Petitioner to ten years on each of the five counts of aggravated sexual battery, ordering "that three counts be served concurrently and two counts be served consecutively, for a total effective sentence of thirty years" to be served at 100% in the Department of Correction.[2] Id. at *3. This Court affirmed his sentences on direct appeal, concluding that they were not improperly enhanced, consecutive sentencing was appropriate, and that the trial court correctly denied probation. Id. at *3–6.

The Petitioner filed a timely pro se petition for post-conviction relief. Post-conviction counsel was appointed, and an amended petition was filed. In his petition, the Petitioner asserted that his trial counsel was constitutionally ineffective for two reasons: (1) he failed to properly communicate to the Petitioner the exposure he would have to "extensive jail time" by entering an open plea; and (2) he failed to object to the fact that his sentencing hearing was held more than forty-five days after entry of his pleas. Subsequently, the post-conviction court held a hearing at which the Petitioner, his son, the Petitioner's wife, and the Petitioner's trial counsel testified.

The Petitioner's son, John Wiley Grindstaff, testified that trial counsel assured the Petitioner that he would receive a probationary sentence if he pled guilty. The Petitioner's wife testified that she accompanied the Petitioner to every meeting he had with trial counsel, and that trial counsel did not indicate that the Petitioner would be incarcerated after pleading guilty. According to her, they were both "shocked" by the fact that the Petitioner was sentenced to prison. She was not aware of any letters trial counsel had sent to the Petitioner prior to the sentencing hearing.

The Petitioner testified that, based on his discussions with trial counsel prior to accepting the State's open plea offer, he expected to receive an alternative sentence after pleading guilty. According to him, trial counsel assured him that he would "fight for a lifetime of probation," and his exposure to jail time was not clearly explained to him. However, he admitted that the assistant district attorney prosecuting his case told him he would be arguing for a sentence of confinement. Nonetheless, he was very surprised when he was sentenced to the penitentiary because he had never been "in trouble" before, and he thought he would "be given probation for life or for so many years." The Petitioner did not recall receiving any letters from trial counsel.

On cross-examination, the Petitioner agreed that he had rejected a plea agreement offer by the State that would have resulted in a total effective sentence of eight years to serve in confinement at 100%. The Petitioner confirmed that as a part of the plea agreement he eventually accepted, the State agreed not to pursue a grand jury indictment on other charges involving another victim (also

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[1] In his statement, the Petitioner admitted to touching the victim's intimate parts on several occasions.

[2] Under the 2003 codification of the Criminal Sentencing Reform Act of 1989, the law under which the Petitioner was sentenced, anyone convicted of aggravated sexual battery was required by statute to serve 100% of the sentence imposed by the court. See Tenn. Code Ann. § 40-35-501(i)(2)(H) (2003). This requirement has not been changed by any subsequent amendments to the Act. See Tenn. Code Ann. § 40-35-501(i)(2)(H) (2006).

a young girl). Again, the Petitioner testified that he could not remember receiving a letter from trial counsel dated January 28, 2005. However, he admitted that prior to pleading guilty, he was aware that the State would be arguing for a sentence of confinement, trial counsel would be arguing for an alternative sentence, and the ultimate decision would be made by the trial court following a sentencing hearing.

Trial counsel testified that he was an assistant public defender in Cocke County, and he handled all felony cases assigned to his office. After being assigned to represent the Petitioner, he had approximately ten meetings with him. Asked whether he explained to the Petitioner the potential sentences he could receive, trial counsel responded as follows:

> I explained to him that at that time the law in 2004 stated that if you had a sentence of one day over eight years, that you had to serve that in the Department of Correction[]. I explained to him that his was one of those Class B felonies that if he were sent to prison, that that would be 100 percent to serve with no more than 15 percent taken off for good time credit. If he received a sentence of eight years, then he would be eligible for alternative sentencings [sic]. And I explained those options to him.

Asked whether he discussed with the Petitioner the likelihood that he would receive probation rather than being sent to the penitentiary, trial counsel explained that he did not guarantee anything to the Petitioner, but told him "that the only way that he could get alternative sentencing would be to enter a plea as we discussed at that point."

Trial counsel acknowledged that he explained the State's original plea offer to the Petitioner, under which he would have received eight-year sentences on each of the five counts—all to be served concurrently—and the Petitioner rejected that offer. After the Petitioner rejected that offer, trial counsel advised the Petitioner that the only way he could avoid jail time was to have a sentencing hearing.

According to trial counsel, the State's next offer was eight to twelve years[3] on each count—all to be served concurrently—but leaving it up to the trial court at a sentencing hearing to determine the sentence length. Asked whether probation would have been an option for the Petitioner if he had accepted that offer, trial counsel explained: "If the court would have given him an eight-year sentence, then the court could have considered alternative sentencing for [the Petitioner]. Anything one day over eight years would still have been a Department of Correction[] sentence. I advised him of that." The Petitioner rejected that offer, and a trial date was set for February 17, 2005.

[3] Because the Petitioner had been charged with Class B felonies, and he was a Range I offender, his sentence range was "not less than eight (8) nor more than twelve (12) years" for each offense. See Tenn. Code Ann. § 40-35-112(a)(2) (2003).

In preparation for trial, trial counsel had an investigator interview the victim. Based on the interview, trial counsel concluded that the victim "would make a good witness for the State if she were called to testify; that she would actually testify about things that were more serious than what [the Petitioner] was actually charged with, including digital penetration, which would make rape of a child."[4]

After setting a trial date, the State made a third plea agreement offer to the Petitioner. Under this agreement, the Petitioner would plead guilty to all five counts, and the State would agree to eight-year sentences, but it would be left to the trial court following a sentencing hearing to determine whether the sentences would be served consecutively or concurrently. The State had withdrawn its offer of concurrent sentencing because additional allegations against the Petitioner involving another young female victim had surfaced, and the State was prepared to submit additional charges to the grand jury if it was not satisfied with the sentence the Petitioner received on the instant charges. However, according to trial counsel, the Petitioner told him "that he didn't think [the victim] and her mom would testify," and he rejected this offer as well.

Trial counsel explained this offer to the Petitioner in a letter[5] dated January 28, 2005 as follows:

> Please be advised that I spoke with [the assistant district attorney] on today's date. He has made the following offer on your case. Upon a plea as charged to the five (5) counts of [aggravated sexual battery], the [S]tate would recommend eight (8) years on each count. A sentencing hearing would be held to determine how that sentence would be served. The State would be free to argue for jail time and even consecutive sentencing on each count due to different dates. We can argue for probation or community corrections (CC). As I told you before, any sentence eight (8) years or less can be placed on alternative sentencing (i.e. probation). Anything over eight (8) years must be served in the [D]epartment of [C]orrection[]. Please note that because the offer is eight (8) years on each count, the [c]ourt could sentence you to some consecutive sentencing; but because it is only 8 years on each, they can give you probation or community corrections for that. (i.e. 16 years or even the maximum of 40 years on probation or CC). Also, if the [c]ourt ordered you to serve your sentence in the DOC, then it must be at 100% (no more than 15% taken off for good time credit) due to the nature of the offense (as we discussed previously).

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[4] The State asserted at the guilty plea submission hearing that, had this matter gone to trial, the victim likely could have provided testimony regarding "at least three events that probably would have amounted to rape of a child involving digital penetration on three distinct occasions." Grindstaff, 2006 WL 1540257, at *1. Additionally, at the Petitioner's sentencing hearing, the victim testified the he digitally penetrated her vagina on more than one occasion.

[5] This letter was introduced as an exhibit at the post-conviction hearing, and it is included in the record on appeal.

Also in the letter, trial counsel informed the Petitioner that if he accepted the offer, the State would not pursue the additional allegations against the Petitioner; however, if he proceeded to trial, additional charges would be filed.

Trial counsel testified that the State would not agree to make a plea offer that would result in a probationary sentence. Trial counsel told the Petitioner "that the only way that I could see him having the possibility of getting alternative sentencing is to come in, accept the responsibility for what he had done, plead guilty and have a sentencing hearing, and we would argue for it." Trial counsel also informed the Petitioner that he could potentially be sentenced to the penitentiary if he accepted an open plea offer, and he told the Petitioner that the State would argue that he should serve his sentence to the Department of Correction.

According to trial counsel, at some point, the Petitioner elected not to go to trial, but to accept the State's final offer of an open plea to all the charges because "he had no defense." The only witnesses that the Petitioner could have put on at trial would have been character witnesses, and none of them were aware that he had confessed to the charges. Trial counsel advised the Petitioner that if he went to trial and was convicted, which was the most likely outcome, then he was "facing a very large sentence" based on the trial court's history in similar molestation cases.

Trial counsel explained to the Petitioner that they would have to present mitigating evidence at the sentencing hearing in order to "show the [c]ourt that [the Petitioner] was a good candidate for probation or alternative sentencing options, and so we got those things in order. Then at the sentencing hearing, we presented quite a bit of information." Trial counsel testified that he "thought we provided enough information for the [c]ourt, that if the [c]ourt wanted to give him alternative sentencing, that that was possible." Trial counsel also testified that, in his opinion, "[i]f anybody would have gotten alternative sentencings with this type of charge, it would have been [the Petitioner] . . . ."

Trial counsel acknowledged that the Petitioner's sentencing hearing was not held within forty-five days of the guilty plea submission as was required by statute.[6] However, trial counsel stated that he did not believe the Petitioner was prejudiced by this delay because, had the sentencing hearing been held earlier, "he would have gone to jail a couple of weeks quicker than what he did."

At the close of the hearing, the post-conviction court dismissed the Petitioner's petition for post-conviction relief. In a later issued amended order, the trial court stated "[t]hat the [Petitioner's] trial counsel . . . was not ineffective in any part of his representation of [Petitioner]. [Trial counsel] competently and effectively represented [Petitioner] throughout his plea negotiations and during his plea in front of this Honorable Court." The post-conviction court also found that the Petitioner was not prejudiced by the fact that his sentencing hearing was held more than forty-five days after he pled guilty.

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[6] Tennessee Code Annotated section 40-35-209(a) (2003) required trial courts to conduct sentencing hearings within forty-five days of the finding of guilt.

ANALYSIS

I. Waiver

Initially, we address the State's argument that the Petitioner's appeal must be dismissed because he has waived appellate review of the issues raised by failing to include a transcript of his guilty plea submission hearing in the record before this Court. The State correctly asserts that the Petitioner bears the burden of preparing a record "that presents a complete and accurate account of what transpired in the trial court with respect to the issue[s] on appeal. The failure to do so results in a waiver of such issues and a presumption that the ruling of the trial court was correct." State v. Thompson, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997) (citing Tenn. R. App. P. 24(b); State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991); State v. Draper, 800 S.W.2d 489, 493 (Tenn. Crim. App. 1990)). However, this Court may take judicial notice of the record presented on direct appeal, and we do so in this case. See Fredrick Tucker v. State, No. M2007-00681-CCA-R3-PC, 2008 WL 2743644, at *4 (Tenn. Crim. App., Nashville, July 14, 2008) ("[T]his court may take judicial notice of the direct appeal record.") (citing State ex rel. Wilkerson v. Bomar, 376 S.W.2d 451, 453 (Tenn. 1964)). Because that record included the transcript from the Petitioner's guilty plea submission hearing, we will address each issue the Petitioner presents.

II. Standard of review

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578–79 (Tenn. 1997). The post-conviction court's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

III. Ineffective assistance of counsel

On appeal, the Petitioner argues that the post-conviction court's dismissal was erroneous because he did not receive the effective assistance of counsel prior to pleading guilty, and therefore, his plea was not knowing and voluntary. More specifically, he argues that he was "subtly encouraged" by trial counsel to expect a twelve-year sentence or less. He contends that the record clearly establishes that trial counsel did not advise him that "he ran a substantial risk of being incarcerated upon being sentenced upon [a] guilty plea and that given the nature of the charges and number of charges, that incarceration was more likely than probation." The State argues that the Petitioner's pleas were knowing and voluntary because the Petitioner did not receive ineffective assistance of counsel.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both

the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

This two-part standard of measuring ineffective assistance of counsel also applies to claims arising out of a guilty plea. Hill v. Lockhart, 474 U.S. 52, 58 (1985). The prejudice component is modified such that the defendant "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59; see also Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

a. Deficient performance

In this case, it is evident from the record that trial counsel advised the Petitioner that it was possible that he could receive an alternative sentence if he entered into an a open plea agreement. Moreover, trial counsel actually attempted to secure an alternative sentence for the Petitioner by

presenting argument and mitigating evidence at his sentencing hearing.[7] However, we conclude that trial counsel's advice in this regard was inaccurate because the Petitioner could not have received an alternative sentence under any circumstances: defendants convicted of aggravated sexual battery are statutorily ineligible for probation or the community corrections program.

As pointed out by this Court on direct appeal, the Petitioner was ineligible for probation. See Grindstaff, 2006 WL 1540257, at *6. Tennessee Code Annotated section 40-35-303(a) (2003) dictates which offenders are eligible for probation, and the provision specifically excludes defendants convicted of certain crimes:

> A defendant shall be eligible for probation under the provisions of this chapter if the sentence actually imposed upon such defendant is eight (8) years or less; provided, that a defendant shall not be eligible for probation under the provisions of this chapter if the defendant is convicted of a violation of . . . § 39-13-504. A defendant shall also be eligible for probation pursuant to § 40-36-106(e)(3).

Tenn. Code Ann. § 40-35-303(a) (2003)[8] (emphasis added); see also Tenn. Code Ann. § 39-13-504 (2003) (defining aggravated sexual battery). Thus, a defendant who is convicted of aggravated sexual battery is not eligible for a probationary sentence under our sentencing law. See Tenn. Code Ann. § 40-35-303(a) (2003).

Moreover, the Petitioner was not eligible for an alternative sentence in the community corrections program because he was convicted of aggravated sexual battery, a crime that involves unlawful sexual contact. See Tenn. Code Ann. § 40-36-106(a)(1)(C) (2003) (dictating that one of the minimum criteria for eligibility for the community corrections program is that a defendant be "convicted of a nonviolent felony offense[]"); see also Tenn. Code Ann. § 40-36-102(11) (2003) (specifically excluding crimes that involve "sexual contact" from the definition of "non-violent felony offense"); Tenn. Code Ann. § 39-13-504(a)(4) (2003) (providing the relevant definition of aggravated sexual battery as being "unlawful sexual contact" with a victim younger than thirteen).

By advising the Petitioner that he could possibly receive an alternative sentence if he pled guilty, trial counsel's representation fell below the minimum level of competence demanded of attorneys in criminal cases because his advice contradicted an applicable and relevant statute that was important to his client's case. See Strickland, 466 U.S. at 687. Consequently, we conclude that trial counsel's performance in representing the Petitioner was deficient in this regard. Trial counsel should have made the Petitioner aware that, under any circumstances, if he pled guilty to or was found guilty of aggravated sexual battery, he would serve his sentence or sentences in confinement.

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[7] The transcript of the Petitioner's sentencing hearing was also included in the record on direct appeal.

[8] We note that this provision was substantially altered by the 2005 amendments to the Criminal Sentencing Reform Act of 1989 because the minimum sentence length for probation eligibility was elevated to ten years. See Tenn. Code Ann. § 40-35-303(a) (2006). However, even under the revised provision, defendants convicted of aggravated sexual battery are not eligible for probation. See id.

We note that it was not only trial counsel who appears to have overlooked the Petitioner's ineligibility for alternative sentencing in this case. Neither the State nor the trial court ever mentioned the Petitioner's ineligibility in any of the proceedings below: it was not discussed at his guilty plea submission hearing or his sentencing hearing. Moreover, this issue was not raised by the Petitioner in his post-conviction action.

b. Prejudice

The Petitioner does assert on appeal that he was prejudiced by trial counsel's deficient performance because he was "unaware of the risks [he] assumed in entering this open plea." The State avers that the transcript from the Petitioner's post-conviction hearing demonstrates that he knowingly and voluntarily pled guilty.

Despite finding that trial counsel's performance was deficient in this case, we are unable to conclude that the Petitioner was prejudiced thereby. Nothing in the record clearly indicates that—had he known he was ineligible for alternative sentencing—he would have accepted a more favorable plea agreement or proceeded to trial. It is evident from the record that the Petitioner was aware that he could be sentenced to a lengthy prison term when he pled guilty. Moreover, he testified that he knew that the details of his sentences would be decided by the trial court, and trial counsel testified that he told the Petitioner that he could be sent to prison for consecutive terms. The record also indicates that the Petitioner rejected some early plea offers from the State, in part, because he thought that the victim would not testify against him and because the additional allegations from the second purported victim had not yet surfaced.

Additionally, the record shows that the Petitioner ultimately decided against a trial because he had no viable defense in light of the statement he had given and the victim's expected testimony, and because the State was going to bring additional, similar charges against him if he did not agree to enter an open plea. Consequently, we cannot conclude that this record presents clear and convincing evidence that the Petitioner was prejudiced by trial counsel's deficient performance.

The Petitioner also argues that he was denied the effective assistance of counsel because trial counsel failed to object when the Petitioner's sentencing hearing was conducted more than forty-five days after his guilty plea was entered. See Tenn. Code Ann. § 40-35-209(a). The post-conviction court found that the Petitioner did not prove that he was prejudiced by the delay. We agree that the Petitioner has not demonstrated that he was prejudiced in any way when his sentencing hearing was conducted more than forty-five days after his guilty plea was entered. This issue has no merit.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the order of the post-conviction court dismissing the petition for post-conviction relief.

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DAVID H. WELLES, JUDGE